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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-735

SEARS, ROEBUCK AND CO.,

Petitioner.

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION.

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1. It is undisputed that what is involved in this case is not the first branch of the preemption line of analysis considered in *Sears, Roebuck and Co.* v. *San Diego County District Council of Carpenters,* 436 U. S. 180 (1978) ("Sears I"), but the second branch of the "line of preemption analysis" recognized in, although "unaffected" by, *Sears I,* 436 U. S. at 199, n. 30.[1]

1. While Respondent suggests that Sears never raised this preemption line of analysis below (Br. Opp. p. 4, n. 1), Sears argued both in its briefs, and at oral argument, that "(i)t [was] . . . this very potential of state interference with the federal labor law scheme which the preemption doctrine was designed to prevent" (Respondent's Supplemental Brief, California Supreme Court No. LA 30562 at 15) and, in fact, repeatedly referenced (*id.* at 6 and 15) this Court's own recognition of the two-pronged "protected" preemption line of analysis underscored in *Sears I.*

This second branch "focus(es) upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.' *N. L. R. B.* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971)." *Ibid.* In this case, the State's refusal to treat Sears as any other property owner confronted by a trespass, solely because that trespass arose as part of a "labor dispute," constitutes such an impermissible regulation of bargaining relationships. A State's determination to withhold court access otherwise available—no less than its decision to grant a special preference in a labor dispute that would not otherwise be permitted—"upsets the balance of power between labor and management expressed in our national labor policy." *Teamsters Union* v. *Morton*, 377 U. S. 252, 260 (1964).

Respondent cannot now avoid this preemption line of analysis by arguing that the "exercise of state authority" is not at issue because "the operative effect of the judgment below . . . is only to *withhold* state regulation on behalf of either party." Br. Opp. p. 6 (emphasis the author's). Despite Respondent's semantic juggling act, the effect of the decision below is the same: the State has imposed its own substantive judgment to alter the balance between labor and management. While state trespass laws are neutral on their face, the Moscone Act, as interpreted by the California courts, is not. It permits union access on private property[2] in a labor context where such access would not otherwise be tolerated. Sears is not asking, as Respondent repeatedly suggests (Br. Opp., pp. 1, 2, 3), that the State be "required" to issue injunctive relief; it is only seeking to have its claim for such relief adjudicated without reference to the State's concept of labor-management relations.

2. Lest Respondent relitigate facts found against it by the trial court, there is no question in this case, as this Court found in *Sears I*, that the union's "pickets patrolled . . . on the privately owned walkways next to (Sears') . . . building or in the (private) parking area a few feet away." *Sears I*, 436 U. S. at 182.

Indeed, California in this case has even rejected the approach of *N. L. R. B.* v. *Babcock & Wilcox*, 351 U. S. 105, 112 (1956), which sought to accommodate federal constitutional property rights with union access rights under the Labor Act. "[T]he principle of accommodation" announced in *Babcock & Wilcox* limits "intrusion on property rights . . . to that necessary to facilitate the exercise of employees' § 7 rights." *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539, 545 (1972). Here, however, the Union's picketing was admittedly not protected by § 7 of the Labor Act. App. A to Pet., p. A3, n. 1. It is not open to California to refuse to apply *Babcock & Wilcox* (App. A to Pet., p. A12) and thereby alter the federally mandated relationship between labor and management.

2. State court jurisdiction cannot be foreclosed for another reason. The "anomalous consequence of a rule which would deny the employer access to any forum in which to litigate either the trespass issue or the protection issue" (*Sears I*, 436 U. S. at 206-07) still remains. This is particularly so inasmuch as the State has also precluded Sears from utilizing self-help to eject the pickets. App. A to Pet., pp. A14-A15, n. 11. This denial of any relief cannot be characterized as mere dicta or irrelevant statement (Br. Opp., p. 6); it is instead an indispensable part of the Moscone Act (see Pet., p. 6) upon which the court below solely predicated its judgment. App. A to Pet., pp. A9-A10, n. 5. In these circumstances, California's denial of any relief against unprotected union activity "raises grave problems for its legitimacy." *Boddie* v. *Connecticut*, 401 U. S. 371, 376 (1971). For example, a State may not prohibit all picketing, other than labor picketing, at public schools. *Police Department* v. *Mosley*, 408 U. S. 92 (1972). See also *Brown* v. *Scott*, 602 F. 2d 791 (7th Cir., 1979), *cert. granted sub nom., Carey* v. *Brown*, No. 79-703 (Jan. 7, 1980); and *People Acting Through Community Effort* v. *Doorley*, 468 F. 2d 1143 (1st Cir., 1972). In such a case, however, the labor dispute exception is not sanctioned by federal preemption of labor relations because of

the exemption of cities and school boards from regulation under the Labor Act. *Id.* at 102, n. 9. Where, as in this case, no such exemption exists, the doctrine of labor preemption precludes a State from granting a special status to designated labor practices.

3. In *PruneYard Shopping Center* v. *Robins,* No. 79-289, this Court has now agreed to decide the issue raised here by Sears concerning the "exercise (of) general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." *Lloyd Corp.* v. *Tanner,* 407 U. S. 551, 568 (1972). While this case also presents other issues, this fact does not vitiate the desirability of this Court's concurrent review of both decisions of the California Supreme Court.

CONCLUSION.

For all of the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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